



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 23, 1996

Ms. Merri Schneider-Vogel
Attorney for
Lamar Consolidated Independent School District
Bracewell & Patterson
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR96-0782

Dear Ms. Schneider-Vogel:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 39220.

The Lamar Consolidated Independent School District (the "district"), which you represent, received two open records requests pertaining, at least in part, to the district's investigation of alleged discriminatory comments made by one of more of the district's employees. You have submitted to this office for review documents from three individuals' personnel files that you contend are excepted from required public disclosure.¹ We assume that the district has made available to the requestors all other responsive documents. You contend that the documents submitted to this office come under the protection of common-law privacy as incorporated into section 552.101 of the Government Code² and sections 552.026 and 552.114 of the Government Code.³

¹Both open records requests seek, among other things, "disciplinary records." You inform us that when the district received the first request, no disciplinary records existed at that time. However, between the time of the first and second request, such records came into being. We therefore address in this ruling whether these particular records must be released to each of the requestors.

²You also state that the district seeks an open records decision from this office pursuant to section 552.305 of the Government Code. In accordance with that section, this office has received briefing from a district employee's attorney as to why certain information should not be released.

Although you raise section 552.101 of the Government Code with regard to the district employees' common-law privacy, we believe that in this instance section 552.102(a) is more applicable because it is specifically designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. See Open Records Decision No. 336 (1982). See also Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.-Austin 1983, writ ref'd n.r.e.).

You contend that "Exhibit B" comes under the protection of common-law privacy. Exhibit B consists of a letter informing an employee that the employee has been placed on paid administrative leave and the reason for being placed on leave. Section 552.102(a) may be invoked only when information reveals "intimate details of a highly personal nature." Open Records Decision Nos. 315 (1982), 224 (1979), 169 (1977). None of the information in Exhibit B comports with this standard. Further, this letter pertains solely to the alleged actions of a public servant, and as such cannot be deemed to be outside the realm of public interest. See Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). Section 552.102(a) does not protect the type of information at issue here.

The attorney for the employee in question has also submitted arguments to this office that the information at issue should not be released to the public because the information implicates the employee's "property" interests. We assume by this that the attorney expresses concern that the release of the letter would violate the employee's liberty interests under the Fourteenth Amendment of the United States Constitution. We note, however, that

[t]o establish a liberty interest, an employee must demonstrate that his governmental employer has brought *false charges* against him that 'might seriously damage his standing and associations in his community,' or that impose a 'stigma or other disability' that forecloses 'freedom to take advantage of other employment opportunities.' *Board of Regents v. Roth*, 408 U.S. 564 (1972).

(Footnote continued)

³You also contend that evaluations of the three individuals are made confidential by section 21.355 of the Education Code. We have severed the information pertaining to teachers' and administrators' evaluations from this file and will rule on those documents in a separate open records ruling, Open Records Letter No. 96-0783 (1996).

Wells v. Hico Indep. Sch. Dist., 736 F.2d 243, 256 (5th Cir. 1984) (emphasis added; parallel citations deleted). However, because the district is currently investigating the allegations, it is not apparent to us that the information at issue, in and of itself, constitutes a "false charge." Consequently, the release of this information would not implicate the employee's Fourteenth Amendment interests.⁴ Furthermore, even if it did, we are aware of no authority for the proposition that information may be withheld under section 552.102 on this basis. We therefore conclude that the district must release Exhibit B.

Finally, you assert that the record submitted as "Exhibit C" is a confidential student record excepted from disclosure under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, and sections 552.026 and 552.114 of the Government Code.⁵ FERPA makes confidential "education records" that 1) contain information directly related to a student; and 2) are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. § 1232g(a)(4)(A). See also Open Records Decision Nos. 462 (1987), 447 (1986). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978).⁶ We have marked a small portion of Exhibit C that identifies a particular student and thus must be withheld from the public. The remaining portions of this document is public and must be released.

⁴We further note that information regarding public employees may not be withheld under section 552.102 merely because the information is false. Cf. Open Records Decision No. 579 (1990) (section 552.101 does not protect false light privacy interests); see also *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994) (state of Texas does not recognize tort of false-light invasion of privacy).

⁵Please note that this office has recently issued Open Records Decision No. 634 (1995), which concluded: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. Thus, you need not seek a decision from this office as to whether any other education records requested in the future must be withheld from disclosure.

⁶But see 20 U.S.C. § 1232g(a)(1)(A), (d) (parent or adult student has affirmative right of access to that student's education records). See also Open Records Decision No. 431 (1985) (Open Records Act's exceptions to required public disclosure do not authorize withholding of "education records" from adult student).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/RWP/rho

Ref.: ID# 39220

Enclosures: Marked documents

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